86 1678

NO. _____

IN THE

Supreme Court Of The United States

October Term, 1986

HAROLD LEE MORRIS,

Petitioner

vs.

JOHN W. GARMON,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Whether state courts may use judicially created procedural rules and doctrines, such as "constitutional arguments not presented to the trial court cannot be raised on appeal" and "the law of the case", to deny full faith and credit to judgments of sister states.

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

JURISDICTION

Judgment of the Arkansas Supreme Court was entered on January 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

REPORTS OF OPINIONS BELOW

The opinions of the Arkansas Supreme Court are *Morris Vs. Garmon*, 285 Ark. 259, 686 S.W.2d 396 (1985) and *Morris vs. Garmon*, 291 Ark. 67, 722 S.W.2d 571 (1987). They are set forth in Appendix A and B to the Petition.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

Article 4, Section 1 Provides:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such act, records and proceedings shall be proved, and the effect thereof.

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari follows two appeals to the Arkansas Supreme Court. An issue argued on both appeals was that the Arkansas Probate Court failed to give full faith and credit to an Order of the Texas Probate Court. On the first appeal the Arkansas Supreme

Court held that Petitioner failed to present the constitutional argument to the trial court and cannot raise it for the first time on appeal. In the second appeal, the Arkansas Supreme Court held that even though the argument was presented in the trial court the decision on the first appeal was the law of the case and was conclusive of every question of law or fact decided in the former appeal which were or might have been presented.

Alren I. Morrison and her husband, who predeceased her, lived for many years in Fort Smith, Arkansas. In 1979, after Mrs. Morrison fell and broke her hip, she was moved to a nursing home in Norman, Oklahoma near where her adopted daughter, Andrea Garmon, lived with her husband, John Garmon, and their two daughters. Mrs. Garmon died a short time after Mrs. Morrison was moved to the nursing home in Oklahoma. Shortly after Mrs. Garmon's death, upon petition of Mr. Garmon, he was appointed conservator of Mrs. Morrison's estate by the District Court of Cleveland County, Oklahoma. On the same day Mrs. Morrison executed a Will whereby she left her entire estate to Mr. Garmon. About six weeks later the Oklahoma Court entered an Order relieving Mr. Garmon of his duties as conservator of the estate and appointed The Security National Bank of

Norman as successor conservator.

In November, 1979, after Mrs. Garmon's death, Mrs. Morrison's brother, Harold Lee Morris, had Mrs. Morrison transferred by ambulance from the nursing home in Oklahoma to a nursing home in Fort Worth, Texas, near where he lived. She remained in the nursing home in Texas until her death on August 4, 1983.

On November 23, 1979, Mrs. Morrison executed her Last Will and Testament in Fort Worth, Texas. By her Will she gave all of her estate to her brother, Mr. Morris, and nominated him to serve as independent executor without bond.

On August 10, 1983 Mr. Morris filed in the Probate Court of Tarrant County, Texas, an Application for Probate of Will and Letters Testamentary. On November 28, 1983 the Probate Court of Tarrant County, Texas entered an Order admitting Mrs. Morrison's Will executed in Fort Worth, on November 23, 1979 to probate and Letters Testamentary were issued to Mr. Morris.

On August 17, 1983, Mr. Garmon filed in the District Court of Cleveland County, Oklaho-

ma, a Petition for Probate of Mrs. Morrison's Will executed in Oklahoma, and requested that Letters Testamentary be issued to him.

On or about December 16, 1983, Mr. Morris filed in the District Court of Cleveland County, Oklahoma, an Objection to the Petition for the Probate of Will which had been filed by Mr. Garmon. Attached to the Objection were copies of the Application for Probate of Will and Letters Testamentary filed in the Tarrant County, Texas, Probate Court, the Last Will and Testament Mrs. Morrison executed in Forth Worth, Texas, Order admitting Will to Probate, and authorizing issuance of Letters Testamentary entered by the Tarrant County Probate Court on November 28, 1983, and the Letters Testamentary issued to Mr. Morris.

On December 19, 1983, Mr. Garmon dismissed without prejudice the Petition for Probate of Mrs. Morrison's Will executed in Oklahoma he had filed in the District Court of Cleveland County, Oklahoma. On the same date, Mr. Garmon filed in the District Court of Cleveland County, Oklahoma, in the conservatorship proceeding a Motion to Stay Disbursement of Conservatorship Assets. In the Motion Mr. Garmon specifically alleged that Mrs. Morrison's domicile was Fort Smith at the time

of her death; that the Order of the Tarrant County, Texas Probate Court was not entitled to full faith and credit under the laws of the State of Oklahoma since the decedent was not a legal domiciliary of the State of Texas at the time of her death; that an Arkansas Court was the proper court to determine Mrs. Morrison's legal domicile; and that the Tarrant County Probate Court was without jurisdiction of the assets held by the conservator since the validity and interpretation of wills as to personal property of Mrs. Morrison was to be governed by the laws of her domicile. In the Motion Mr. Garmon requested an order prohibiting the conservator from disbursing any assets of the conservatorship estate until it received an order from a court of competent jurisdiction which could be afforded full faith and credit under the laws of the State of Oklahoma. On February 15, 1984, following a hearing on February 10, 1984, the District Court of Cleveland County, Oklahoma, entered an Order overruling Mr. Garmon's Motion to Stay Disbursement. Subsequent to that Order entered by the Oklahoma Court, before whom appeared both Mr. Morris and Mr. Garmon, the assets of Mrs. Morrison's estate held by the conservator were transferred to Mr. Morris as independent executor under the Will executed in Texas. On February 27, 1984, Mr. Morris filed in the Tarrant County Probate

Court an Inventory, Appraisement, and List of Claims. The inventory showed the certificate of deposit and shares of stock that were transferred to Mr. Morris by the conservator in Oklahoma.

On January 26, 1984, Mr. Garmon filed in the Probate Court of Sebastian County, Arkansas, a Petition For Appointment of Administrator of the Estate of Alren I. Morrison, Deceased. By this time Mr. Morris and Mr. Garmon had been or were parties in two separate proceedings in the District Court of Cleveland County, Oklahoma: one was for the probate of Mrs. Morrison's Will executed in Oklahoma and the other was the conservatorship. Both proceedings were initiated by Mr. Garmon. In addition to the two proceedings in Oklahoma, Mr. Garmon had notice of the proceeding in the Tarrant County Probate Court. Mr. Garmon had an attorney in Oklahoma as well as in Texas throughout this period of time.

In the Petition filed in the Sebastian County Probate Court, Mr. Garmon requested that Merchants National Bank of Fort Smith be appointed administrator of Mrs. Morrison's estate. Mr. Morris filed a Response to that Petition and pled the probate of the Will in Tarrant County, Texas. Subsequent thereto the parties filed additional pleadings and a hearing

was held on July 26, 1984. At the conclusion of the hearing the Sebastian County Arkansas Probate Court found that Mrs. Morrison was a domiciliary of the State of Arkansas and that her two granddaughters were pretermitted heirs who were entitled to the share of the Estate which would pass to them under the Arkansas Law of Descent and Distribution. The Sebastian County Probate Court admitted the Will executed in Texas to ancillary probate in Arkansas and appointed Merchants National Bank as ancillary administrator. The Sebastian County Probate Court ordered Mr. Morris to deliver immediately to the ancillary administrator all of the money and property of Mrs. Morrison which had come into his possession. Mr. Morris did as he was directed.

Mrs. Morrison's grandchildren are pretermitted heirs under Arkansas Law, Ark. Stat. Ann. 60-507 (b) (Repl. 1971), but are not pretermitted heirs under Texas law, V.A.T.S., Probate Code Section 67.

After the first appeal, and after the time for filing claims had expired, but before final distribution of the assets that had come to the ancillary administrator in Arkansas through the independent executor in Texas from the conservator in Oklahoma, Mr. Morris filed a Petition to

Transfer Residue of Assets to Independent Executor in Texas (transcript, pages 75-114). The Petition alleged that the Order of the Tarrant County Texas Probate Court was entitled to full faith and credit as to assets located outside of the State of Arkansas and that the Order of the Cleveland County Oklahoma District Court was res judicata as to all issues that were determined or which could have been determined as to assets located outside of the State of Arkansas. The Sebastian County Probate Court denied the Petition. The Arkansas Supreme Court then affirmed the Sebastian County Probate Court, relying on the doctrine of the law of the case. Mr. Morris now files this Petition for a Writ of Certiorari.

ARGUMENT

The real question presented for review is whether state courts may use judicially created doctrines, such as "the law of the case", to deny full faith and credit to judgments of sister states.

The Arkansas Supreme Court held on the first appeal that Petitioner had not presented his constitutional argument to the trial court. Petitioner does not agree with this finding. It is true that Petitioner did not mention the magic words, "full faith and credit", in his pleadings. Nonetheless, Petitioner's first pleading filed in the Arkansas trial court was a demand for notice of proceedings for appointment of personal representative. (first transcript, page 4) Copies of the Letters Testamentary, Last Will and Testament, and Order admitting the Will to probate from the Texas Probate Court were attached as exhibits to the demand. Next, Petitioner filed a Response of Personal Representative to Petition for Appointment of Domiciliary Administrator in Arkansas and attached thereto authenticated copies of the Last Will and Testament, Letters Testamentary, and Order admitting the Will to probate entered by the Texas Probate Court. (first transcript, pages 13—22) Furthermore, copies of the documents

from the Texas Probate Court as well as documents from the Oklahoma District Court were admitted into evidence at the hearing held in the case. All such documents were squarely before the trial court before the first appeal.

Arkansas had a case that was directly on point. The case of *State Ex Rel Attorney General vs. Wright,* 194 Ark. 652, 109 S.W.2d 123 (1937) was controlling. There an Arkansas domiciliary left a purported will bequeathing personalty consisting altogether of deposits in Texas bank, which were regarded as having a Texas situs. The will was duly probated in Texas. Then a proceeding was begun in Arkansas attacking the will as a forgery. The Arkansas Supreme Court held that the action could not be entertained, saying that the full faith and credit clause required that the Texas probate be respected.

Contrary to the Arkansas Supreme Court, the Hawaii Supreme Court held in *Smith v. Smith,* 56 Haw. 295, 535 P.2d 1109 (1975) that even though the appellant failed to properly raise the issue of full faith and credit on the record in the trial court, the Supreme Court could decide such issue, if it were necessary for the resolution of the case, because it would be of great constitutional and public importance and would

require no further facts for determination.

After the first appeal, and after the time for filing claims against the estate had expired, but before distribution of the assets, Petitioner filed in the Sebastian County Probate Court a verified Petition to Transfer Residue of Assets to Independent Executor in Texas. The Petition squarely faced before the Sebastian County Probate Court the issues of full faith and credit and res judicata of the orders from the Texas and Oklahoma courts as those orders affected assets located outside the state of Arkansas. (second transcript, pages 75—114) Attached as exhibits to the Petition were relevant pleadings and orders from the Texas and Oklahoma courts. The Sebastian County Probate Court denied the Petition and Petitioner took a second appeal to the Arkansas Supreme Court. The Arkansas Supreme Court held on the second appeal that the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, buy were not, presented.

It is interesting to note that Respondent did not plead or argue in the trial court after the first appeal or in the Arkansas Supreme Court on the second appeal the doctrine of the law of the case.

The Arkansas Supreme Court held on the first appeal that arguments not presented in the trial court would not be considered on appeal. It did not follow its own ruling on this issue on the second appeal.

In examining Petitioner's argument here, it is helpful to see the issues that Respondent presented to the court in Oklahoma. In his Motion to Stay Disbursement of Conservatorship Assets (transcript, page 107), Respondent alleged:

> 1. At the time of her death Mrs. Morrison's domicile was Fort Smith, Arkansas.
>
> 2. Mr. Morris has caused to be entered the purported last will and testament of Mrs. Morrison into probate in the Probate Court of Tarrant County, Texas.
>
> 3. The Order of the Probate Court of Tarrant County, Texas is not entitled to full faith and credit under the laws of the State of Oklahoma since the decedent was not a legal domiciliary of the State of Texas at the time of her death.
>
> 4. The proper court to determine dece-

> dent's legal domicile is the District Court of Sebastian County, Arkansas which has not adjudicated said issue.
>
> 5. Garmon fears the conservator will disburse the conservatorship assets to a court which was without proper jurisdiction over said assets since the validity and interpretation of will as to personal property of the decedent is governed by the laws of the testator's domicile.

The Oklahoma court overruled Respondent's Motion (second transcript, page 109) and Respondent took no appeal.

On the second appeal the Arkansas Supreme Court adhered to the rigid application of the doctrine of the rule of the case even in cases in which federal constitutional issues are involved. Under the full faith and credit clause, local doctrines of res judicata become a part of national jurisprudence and are, therefore, federal questions cognizable before the United States Supreme Court. *Durfee vs. Duke*, 375 U.S. 106, 11 L.Ed.2d 186, 84 S.Ct. 242 (1963). The United States Supreme Court is the final arbiter of questions raised under the full faith and credit clause. *Johnson vs. Muelberger*, 340 U.S. 584,

95 L.Ed. 552, 71 S.Ct. 474 (1951).

Not all states adhere to the law of the case doctrine as Arkansas does, whether constitutional questions are involved or not. This is, therefore, an important question of federal law which should be settled by this Court.

In *Potter vs. Easley*, 288 Ark. 133, 703 S.W.2d 442 (1986), the Arkansas Supreme Court reexamined the doctrine of the law of the case and decided to adhere to it. In a dissenting opinion, Justice Newbern said:

> The changes taking place in the law of the case doctrine and cases from the jurisdictions which have departed from the totally inflexible approach are outlined in Annot., 87 A.L.R.2d 271 (1963), and its later cases supplement. While a long opinion could be written setting out the reasons given in modern cases for the exercise of some discretion in application of the law of the case doctrine, it need not be done here because the subject is treated comprehensively in A. Vestal, *Law of the Case: Single Suit Preclusion*, 1967 Utah L.Rev. 1. Additionally, I believe the facts of the case before us are sufficient to illustrate both sides of the issue. *Potter v. Potter* is a little

like *Jarndyce v. Jarndyce*. It seems to go on forever. As the majority opinion points out, one trial judge left the case because of his frustration with it. The temptation to opt for "finality over everything" is present. However, we should not let our frustration get the better of us to the extent we refuse to recognize our mistake and correct it. If the majority wishes to say our historical embrace of the law of the case doctrine is unyielding despite *Ferguson v. Green, supra*, I believe we should do as the Florida court in *Strazzulla v. Hendrick*, 177 So.2d 1 (Fla. 1965) and "expressly recede" from the doctrine to the extent it requires that we never correct in second appeals our errors in first appeals. *See also Greene v. Rothschild*, 68 Wash.2d 1, 5, 414 P.2d 1013 (1966), and *Union Light, Heat & Power Co. v. Blackwell's Administrator*, 291 S.W.2d 539 (Ky. 1956). As Professor Vestal said in the article cited above:

> An examination of the recent cases involving the effect of an earlier appellate decision upon the same question before the same court at a later time suggests that the "law of the case" doctrine has lost most of its force. Appellate courts should decide

> cases correctly; any other course would distort the law and treat litigants unfairly. It may be fair to say that the earlier decision is not binding, that "law of the case" does not apply, unless it is an exceptional case. Absent such exceptional circumstances, the appellate court should decide all legal questions correctly without regard to earlier decisions by the court. [1967 Utah L.Rev. at 15.].

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

285 Ark. 259
Harold Lee MORRIS, Appellant,

v.

John GARMON, Appellee.

No. 84—267.

Supreme Court of Arkansas.

March 18, 1985.

Rehearing Denied April 22, 1985.

HAYS, Justice.

By this appeal we are asked to reverse a probate court finding that Mrs. Alren Morrison was domiciled in Ft. Smith, Arkansas when she executed a will in November, 1979, and when she died in August, 1983. This dispute over a part of her estate is between her brother, the devisee under her will, and her son-in-law and two granddaughters, the appellees.

Mrs. Morrison and her husband had lived in Ft. Smith for many years. After Mr. Morrison's death in 1975 she continued to live in the home until 1979, when she fell and broke her hip. When she was ready to leave the hospital her adopted daughter, Andrea Garmon, arranged for her to be moved to a Norman, Oklahoma, nursing home, near where Mrs. Garmon lived.

In September of that year Mrs. Garmon died from a recurrence of hepatitis. Some days later, Mrs. Morrison executed a will leaving her estate to John Garmon, expressing confidence that he would care for her two minor granddaughters, Kristin Garmon and Katherine Garmon. John Garmon and his daughters are the appellees. On Mr. Garmon's petition, Mrs. Morrison's assets were placed in a conservatorship. In October, 1979, Mrs. Morrison's brother, appellant Harold Morris, moved Mrs. Morrison to a nursing home in Ft. Worth.

In November or 1979, shortly after arriving in Ft. Worth, Mrs. Morrison executed a new will leaving everything to Harold Morris, or if he failed to survive her, to another brother, and if he failed to survive, to a niece. In August, 1983, Mrs. Morrison died in Ft. Worth.

Harold Morris offered the will for probate in

Tarrant County, Texas, and letters testamentary were issued. He then obtained an order in Oklahoma, directing the conservator to deliver the Oklahoma assets to him as executor.

In January, 1984, John Garmon petitioned the Sebastian Probate Court for letters of administration on the grounds that Mrs. Morrison was domiciled in Ft. Smith when she died and that her two granddaughters were pretermitted heirs under the Texas will. Harold Morris responded, alleging that Mrs. Morrison was a domiciliary of Ft. Worth. The probate judge found Mrs. Morrison to have been domiciled in Ft. Smith when she executed the second will and when she died, that the will should be construed according to Arkansas law, under which Mrs. Morrison's granddaughters were undisputably pretermitted heirs. The order directed Mr. Morris to deliver to the administrator the assets he was holding as executor.

Two points are presented on appeal: The Sebastian Probate Court erred in failing to give full faith and credit to the order of the Tarrant County Probate Court, admitting the will to probate in Texas, and the finding that Mrs. Morrison was domiciled in Ft. Smith is clearly erroneous.

[1,2] The appellees maintain the full faith and credit argument was not presented to the probate judge, and the record bears out this contention. We find no mention of the argument in the proceeding below. The appellant introduced the will, the order of probate and other filings from the Texas and Oklahoma proceedings, but those documents were offered on the issue of domicile and do not impliedly express a full faith and credit argument not otherwise stated. Moreover, at the outset of the hearing below both sides informed the probate judge that the disputed issue was whether Mrs. Morrison was domiciled in Arkansas or in Texas when her will was made and when she died. We conclude the constitutional argument was not presented to the trial court and, hence, cannot be raised on appeal. *Gay v. Rabon,* 280 Ark. 5, 652 S.W.2d 836 (1983).

Appellant argues the issue of domicile is res judicata as that question was decided between these parties in connection with the Oklahoma proceedings. As with the full faith and credit issue, the point was not represented nor ruled on below.

[3] Appellant's argument fails in any case. The Arkansas court could properly address the

issue of domicile, as such a finding by a foreign court in a probate proceeding goes to jurisdiction and can be considered collaterally by a second state without a violation of the full faith and credit clause. See Leflar, American Conflicts Law, Pp. 411-412; Wills, 80 Am. Jur.2d § 1056, p. 185; *Matter of Will of Lamb,* 303 N.C. 452, 279 S.E.2d 781 (1981); *Burbank v. Ernst,* 232 U.S. 162, 34 S.Ct. 299, 58 L.Ed 511 (1914); *Re Clark's Estate,* 148 Cal. 108, 82 P. 760 (1905); *Smith v. Normart,* 51 Ariz. 134. 75 P.2d 38 (1983); *Scripps v. Durfee,* 131 Mich. 265, 90 N.W. 1061 (1902). And see *Phillips v. Sherrod Estate,* 248 Ark. 605, 453 S.W.2d 60 (1970).

[4,5] With respect to the second point, we cannot say the finding as to domicile was clearly erroneous. "To effect a change of residence or domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last-acquired residence a permanent home." *Phillips v. Sherrod Estate, supra; Oakes v Oakes,* 219 Ark. 363, 242 S.W.2d 128 (1951) The intent to abandon one's domicile and take up another must be ascertained from all the facts and circumstances in any particular case. *Oakes v Oakes, supra.*

Here, the decedent was a long time resident of Ft. Smith. After her fall there was no one to care for her in her home so she was moved to nursing homes, first to Oklahoma then to Texas. While in the Ft. Worth nursing home, she fell again, prolonging her convalescence in Ft. Worth.

After Mrs. Morrison was moved to Oklahoma, and thereafter in the Texas nursing home, her home in Ft. Smith was kept in a state of readiness for her return. None of the furniture was removed, utilities were kept on, her car was parked in the carport and the yard was regularly maintained, all with her knowledge and approval. She maintained her membership in the First United Methodist Church of Ft. Smith and on numerous occasions expressed to her grandchildren and to neighbors a stedfast hope of returing to her home in Ft. Smith—to be with friends, and to engage in normal activities. Although there was evidence of a contrary intent, we cannot say the finding of the probate judge was clearly erroneous. ARCP 52(a).

Our holding in *Oakes v Oakes, supra,* is instructive. Mrs. Oakes, an Arkansas domiciliary, developed tuberculosis and entered a sanitarium in New Mexico in 1947. She took only

her clothing, leaving her furniture and household goods in her home in Arkansas. Her two children went to live with grandparents in Texas. She returned to Arkansas three years later to testify in the divorce case she had filed against her husband. She told the court she planned to return to the sanitarium for an indefinite duration. We found no evidence that Mrs. Oakes had acquired a new domicile and added: "A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long."

Affirmed.

APPENDIX B

Harold Lee MORRIS, Appellant,

v.

John W. GARMON, Appellee.

No. 86—126.

Supreme Court of Arkansas.

January 20, 1987.

DUDLEY, Justice.

In the original appeal of this case, *Morris v. Garmon*, 285 Ark. 259, 686 S.W.2d 396 (1985), we affirmed the holding of the probate court that Alren Iris Morrison was domiciled in Fort Smith at the time of her death. That holding meant that Arkansas law governed the probate, descent and distribution of the estate, and that the decedent's grandchildren, who were pretermitted heirs of the predeceased child, inherited the estate. Following our decision, appellant Harold Morris, the decedent's brother, filed a

petition praying that the assets be transferred to him as an Independent Executor in Texas. The probate court denied appellant's request and ordered the Arkansas personal representative to make final distribution to the heirs and close the estate. We affirm.

[1] Appellant first argues that the trial court erred in refusing to strike appellee's response to his petition praying transfer of assets, and in refusing to grant the petition by default since the appellee did not respond to his petition within 10 days. *See* rule 2 (c) of the Unif. Rules of Circuit and Chancery Courts. Appellant is precluded from raising the point because he did not preserve the appealability of the order refusing to strike and denying default.

[2] Arkansas Stat. Ann. § 62—2016(a) and (b) (Repl. 1971) provides that all orders of a probate court are appealable except orders removing a fiduciary for failure to give a new bond or render an accounting, and orders appointing a special administrator. Section 62—2016(d) provides that in order to preserve the appealability of an intermediate probate order, the appellant must file a written objection to the order within sixty days from the date the order was rendered. The appealability of the intermediate order is then preserved and may be

appealed at the time of appeal of the final order. *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980). Here, the order, denying the motion to strike was filed on September 18, 1985, and no written objection was filed. The notice of appeal, after the final order, was given on March 12, 1986. Thus, the point was not preserved. However, even if the point had been preserved the probate judge had discretion in the matter, and she did not abuse that discretion by refusing to grant a default judgment on the merits which effectively would have been contra to our prior ruling.

[3,4] Appellant's next two points can best be discussed together. He argues that the probate court erred in failing to give full faith and credit to an order of the Texas probate court, and in failing to apply the doctrine of res judicata to an order of the Oklahoma district court. On second appeal, as in this case, the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *First American National Bank v. Booth*, 270 Ark. 702, 606 S.W.2d 70 (1980). The rule is founded upon a policy of avoiding piecemeal litigation. *First American National Bank, supra.*

In our first opinion, we wrote:

> Two points are presented on appeal: the Sebastian Probate Court erred in failing to give full faith and credit to the order of the Tarrant County Probate Court, admitting the will to probate in Texas, and the finding that Mrs. Morrison was domiciled in Ft. Smith is clearly erroneous.
>
> The appellees maintain the full faith and credit argument was not presented to the probate judge, and the record bears out this contention. . . . We conclude the constitutional argument was not presented to the trial court and hence, can not be raised on appeal.
>
> Appellant argues the issue of domicile is res judicata as that question was decided between these parties in connection with the Oklahoma proceedings. As with the full faith and credit issue, the point was not presented nor ruled on below.

The above quoted paragraphs demonstrate that appellant's two points of appeal were

decided in the first appeal. The first decision became the law of the case and is conclusive.

[5] The final point asserted by appellant is that the probate court erred in failing to order the return of assets to him as the Independent Executor in Texas. The probate court was correct. Appellant has not presented any reason which would justify transferring the assets to Texas. Under Arkansas law, the two grandchildren of the decedent are pretermitted heirs and are entitled to inherit all of the assets of the estate. The probate court has ordered the Arkansas administrator to make final distribution and close the administration. Transferring the assets to Texas would serve no purpose whatsoever.

Affirmed.

No. 86-1678

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v.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Arkansas

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Does a state appellate court violate the full faith and credit clause of the United States Constitution if on appeal it refuses to consider an issue because it was not presented to the trial court?

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On Petition for a Writ of Certiorari to the Supreme Court for the State of Arkansas

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The case now before this Court was initiated January 26, 1984, when John Garmon filed in the Probate Court for Sebastian County, Arkansas, a Petition for Appointment of Administrator of the Estate of Alren I. Morrison, Deceased. (1 Tr. P. 2)

On March 2, 1984, Harold Lee Morris caused to be filed in the proceeding just identified a Demand for Notice of Proceedings for Appointment of Personal Representative. (1 Tr. P. 4) Attached to this document was a copy of a Texas Will, a copy of the Order of the Tarrant County, Texas, Probate Court admitting the Will to probate, and a copy of Letters Testamentary issued by that Court to Harold Lee Morris. (1 Tr. P. 4) On March 14, 1984, there was filed in the Probate Court for Sebastian County, Arkansas, by Harold Lee Morris a Response to Petition for Appointment of a Domiciliary Administrator in Arkansas. This pleading alleged that Mrs. Morrison was domiciled in Texas, that her Will had been admitted to probate in Texas, asked that it be admitted to probate in Arkansas, and if an Administrator were needed in Arkansas, that Harold Lee Morris be appointed. This pleading made no mention of the full faith and credit clause of the United States Constitution, nor was there any allegation of *res judicata*. (1 Tr. P. 13, *et seq.*)

Next, on March 26, 1984, there was filed a Petition for John W. Garmon alleging that Mrs. Morrison had been domiciled in Arkansas, and that her estate should be administered and distributed pursuant to the laws of Arkansas. (1 Tr. P. 23) Mr. Morris filed a response to this Petition repeating his prayer that the Texas Will be admitted to probate in Arkansas, and that if there were to be any administration in Arkansas, that he be appointed Administrator. (1 Tr. P. 25) There was no mention of the full faith and credit clause of the United States Constitution, nor any mention of the principle of *res judicata*.

On these pleadings, the matter came on for hearing before the Probate Judge for Sebastian County, Arkansas.

In his opening statement, counsel for Mr. Morris concluded with the following comment:

> "So, I think when it really boils down to the nuts and bolts, what we're concerned about, here, is where the domicile of the decedent was at the time of her death and whether this Court should assume jurisdiction over any of these matters that a Court of competent jurisdiction in a sister state has assumed initially under a doctrine of Court." (1 Tr. P. 55)

After hearing the testimony of the witnesses for both sides, the Probate Judge found that Mrs. Morrison was domiciled in Arkansas at the time the Texas Will was made, and also at the time of her death. She admitted the Texas Will to probate, apointed Merchants National Bank of Fort Smith, Arkansas, as Ancillary Administrator of the Estate, and ordered Mr. Morris to deliver the assets of the estate to the Arkansas Administrator. (1 Tr. P. 205-209) On July 26, 1984, an Order was entered containing findings of fact and directions consistent there with. (See Appendix A, App. 1, to this brief) It was from this Order that the first appeal was taken.

In the statement in his brief on appeal, Mr. Morris for the first time in the proceeding mentioned the full faith and credit clause of the United States Constitution. His first point stated:

> "I. THE SEBASTIAN COUNTY PROBATE COURT ERRED IN FAILING TO GIVE FULL FAITH AND CREDIT TO THE ORDER OF THE TARRANT COUNTY, TEXAS PROBATE COURT AND ORDERING THE INDEPENDENT EXECUTOR IN TEXAS TO DELIVER THE ANCILLARY ADMINISTRATOR ALL OF THE DECEDENT'S MONEY AND PROPERTY WHICH HAD COME INTO HIS HANDS AS INDEPENDENT EXECUTOR." (Appellant's First Brief P. 4)

His second and final point asserted that the finding that Mrs. Morrison was domiciled in Arkansas was erroneous. In this Brief, there was one passing reference to the principle of *res judicata.*

The Arkansas Supreme Court applied the well-established rule that points not presented to the trial court cannot be asserted on appeal. (Petitioner's Brief, Appendix 4) In addition, it held that even if the full faith and credit argument had been presented, the issue of domicile goes to the question of jurisdiction, and can be collaterally considered by another state without violating the full faith and credit clause.

Mr. Morris petitioned the Arkansas Supreme Court for a rehearing. This was denied. There was no move at that time to ask this Court for a Writ of Certiorari, although the status of the case and the active issues were fundamentally the same then as they are now.

The case was remanded by the Arkansas Supreme Court to the Sebastian County Probate Court about April 22, 1985. On August 7, 1985, Mr. Morris filed his Petition to Transfer Residue of Assets to Independent Executor in Texas. There was no hearing on this Motion, which was denied by the Probate Judge. Petitioner appealed this Order to the Arkansas Supreme Court. The record before the Arkansas Supreme Court on the second appeal was basically identical with the one which was before that Court in the previous appeal. The Arkansas Supreme Court held that its decision on the full faith and credit issue and the *res judicata* issue in the first appeal became the law of the case, and would not be reconsidered on a second appeal. (Petitioner's Brief, Appendix P. 10) It is

to review this decision that the Writ of Certiorari is requested.

PART TWO

REASONS WHY THE PETITION SHOULD BE DENIED

We submit that the Petition for Certiorari filed in this matter fails quite obviously to present any special or important reason why it should be granted. There is nothing to establish that the state court of last resort decided a federal question in a way in conflict with the decision of another state court of last resort, or of a federal court of appeals. Neither did the Arkansas Supreme Court, in either of its opinions, decide an important question of federal law which has not been, but should be, settled in this Court, nor did it decide a federal question in a way in conflict with the applicable decisions of this Court.

I. The question of domicile was presented to the Arkansas Probate Court by the Petitioner, and was decided by that Court based on the evidence before that Court.

To begin with, there was no contention ever made in the initial proceeding in the Probate Court for Sebastian County, Arkansas, that that court was legally bound by the full faith and credit clause of the United States Constitution to distribute all of the assets of the estate in accordance with the provisions of the Texas Will. The only issue actively litigated in that first and only hearing in the Probate Court was the domicile of Mrs. Morrison at the time of her death. (See Order entered by Honor-

able Bernice Kizer, Probate Judge, dated August 2, 1984, which is presented as an Appendix to this Brief.)

This Court has held that the courts of one state can review the question of domicile when that question has been answered by the court of another state without violating the full faith and credit clause of the United States Constitution. In *Burbank v. Ernest,* 232 U.S. 162, 58 L.Ed. 551, 34 S.Ct. 299 (1913), this Court held that the courts of Louisiana did not violate the full faith and credit clause of the United States Constitution when the Louisiana court refused to give effect to a Will which had been probated in Texas, on the ground that the testator was domiciled in Louisiana, notwithstanding the fact that a Texas court had held that the domicile of the decedent was in Texas. The decision in the *Burbank* case was relied on by the Arkansas Supreme Court in its first opinion in this case, and was also applied by the Court of Appeals for the Fifth Circuit in 1971 in the case of *Diehl v. United States,* 5th Cir., 438 F.2d 705 (1971), in which it was said:

> "Where jurisdiction depends upon domicile that question is also open to re-examination, even upon contradictory evidence, *Burbank v. Ernest,* 1914, 232 U.S. 162, 34 S.Ct. 299, 58 L.Ed. 551, expressly followed in *Barney v. Huff,* 326 S.W.2d 617, 621 (Tex.Civ.App. 1959)."

Thus, it appears clear that the Probate Court and the Arkansas Supreme Court were completely justified in ruling on the issue of domicile, since it was squarely and definitely presented to those courts by the Petitioner.

II. Appellate courts are not required by the United States Constitution to consider issues not presented in the trial court.

The issues of full faith and credit and *res judicata* were never mentioned in the first proceeding in the Sebastian County Probate Court. The first time these issues were mentioned was in the Brief filed on behalf of Mr. Morris by his new attorney in his appeal from the Order of the Sebastian County Probate Court entered August 2, 1984, finding that Mrs. Morrison was domiciled in Arkansas, and that Arkansas law should govern distribution of the assets of the estate. The Arkansas Supreme Court found that neither the full faith and credit, nor the *res judicata* issue, were presented to, nor ruled on, by the Probate Judge, and as a consequence, could not be raised for review on appeal. *Morris v. Garmon* (1985), 285 Ark. 259, 686 S.W.2d 396, 398 (Petition, Appendix P. 4-5).

The rule, or practice, that appellate courts will not on appeal consider arguments, contentions, or issues not presented to and ruled on by the trial court, appears to be one universally followed by both state and federal courts, with possibly rare exceptions. *See* 5 Am.Jur.2d, Appeal and Error, § 545. The rule has long been in effect in Arkansas, and has been invoked many times.

One of the more recent cases on the subject decided by the Arkansas Supreme Court, and which also involved an attempt to invoke a constitutional question for the first time on appeal, is *Chapin v. Stuckey* (1985), 286 Ark. 359, 692 S.W.2d 609, 615. In that case, the Arkansas Supreme Court said:

> "A final argument is that the appointment of a receiver was, in effect, the appointment of a conservator in violation of Arkansas law and the due process clause of the federal and state constitutions. * * *
>
> "The argument was not, however, first offered to the trial court and may not, therefore, be made on appeal. Even arguments of constitutional dimension must be argued below if they are to be preserved on appeal. *May v. Barg,* 276 Ark. 199, 633 S.W.2d 376 (1982); *Williams v. Edmonson,* 257 Ark. 837, 520 S.W. 2d 260 (1975); *Arkansas Memorial Gardens, Inc. v. Simpson,* 238 Ark. 184, 381 S.W.2d 462 (1964)."

The same rule and practice is followed by the federal courts. *See Drainage District No. 2 of Crittenden County, Arkansas, et al. v. Mercantile-Commerce Bank & Trust Co. of St. Louis, Missouri,* (8th Cir. 1934), 69 F.2d 138, cert. den. 293 U.S. 566, 55 S.Ct. 77, 79 L.Ed. 665. Again, in *Sisco v. McNutt,* (8th Cir. 1954), 209 F.2d 550, 553, the Court said:

> "* * * The general and almost invariable rule is that questions not called to the attention of or ruled upon by a trial court will not be reviewed on appeal. * * *"

Thus, the failure of the Petitioner to present to the Probate Judge the issues of full faith and credit and *res judicata* clearly justified the Arkansas Supreme Court in declining to consider these matters on appeal.

After the opinion of the Arkansas Supreme Court was filed, Petitioner filed a Petition for Rehearing asking that the Arkansas Supreme Court reconsider its rulings on the full faith and credit and *res judicata* contentions. The request for rehearing was denied on April 22, 1985.

If Petitioner believed that he was being denied his constitutional rights, he could and should have filed his Petition for a Writ of Certiorari with this Court at that time. Instead, the case was remanded to the Sebastian County Probate Court on April 22, 1985, for such further proceedings as might be required to complete administration of the estate.

On August 7, 1985, Petitioner filed in the Sebastian County Probate Court his Petition to Transfer Residue of Assets to Independent Executor in Texas. In this Petition, he alleged that the Order of the Probate Court of Tarrant County, Texas, was entitled to full faith and credit as to assets that were located outside of the State of Arkansas, and that the Order of the District Court of Cleveland County, Oklahoma, was *res judicata* as to all issues that were determined, or which could have been determined, as to assets located outside of the State of Arkansas.

On February 13, 1986, the Probate Judge entered an Order denying the Petition to Transfer Assets, noting "that the assertion in the Petition that the full faith and credit clause of the U.S. Constitution binds this Court to comply with orders of a Probate Court of Tarrant County, Texas, was presented to and denied by the Arkansas Supreme Court in the case mentioned above; that the assertion that this Court is bound by the principle of *res judicata* to comply with an Order of the District Court of Cleveland County, Oklahoma, was also disposed by the opinion of the Arkansas Supreme Court mentioned above. * * *" (See Appendix B, App. 7, to this brief)

Again, the Order of the Probate Judge was appealed to the Arkansas Supreme Court. Again, the issues of full faith and credit and *res judicata* were asserted as grounds for reversal. The opinion of the Arkansas Supreme Court points out that these same contentions were made in the first appeal, that they were disposed of by the first opinion of the Arkansas Supreme Court, as a result of which the Court declined to review them again. (*See* Petition, Appendix P. 10-12)

We also call attention to the fact that all court records from Texas and Oklahoma referred to on the second appeal were part of the record on the first appeal, although only the Order of the Tarrant County, Texas, Probate Court admitting the Morrison Will to probate, and appointing Mr. Morris as Executor, was referred to by appellant on his first appeal.

At this point, we would also call attention to the fact that full faith and credit was in fact accorded to the Order of the Tarrant County, Texas, Probate Court admitting to probate the Will of Alren Morrison, executed in Texas. We also note that there had never been any hearing or any order by a Texas court dealing with the subject of the distribution of the assets of the estate. All that had been done in Texas was to admit the Will to probate and appoint Mr. Morris executor. This was done November 28, 1983. At that time, most of the intangible assets of the estate were in Oklahoma, not Texas, and remained there until February of 1984. The probate proceeding in Arkansas was begun January 26, 1984, and Mr. Morris voluntarily entered his appearance in that proceeding. Thus, when the question of domicile and the right to inherit the

assets of the estate were decided, all parties were before the Probate Court of Sebastian County, Arkansas, and the intangible assets were placed in the custody of the Sebastian County Probate Court without objection by Mr. Morris.

III. Application of the principle "the law of the case" does not give rise to a question of federal law.

In commenting on his second appeal to the Arkansas Supreme Court, Petitioner takes exception to the position taken by the Arkansas Supreme Court holding that the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those questions which might have been, but were not presented. Petitioner asserts that this presents "an important question of federal law which should be settled by this Court."

It appears to us that this question was long ago settled by this Court. The Arkansas Supreme Court's decision in *Miller Lumber Company v. Floyd*, 169 Ark. 473, 275 S.W. 741 (1925), applied this principle on a second appeal, saying:

> "* * * Whether this decision was right or wrong, it is the law of the case; it is *res judicata*. The rule has been long established in this State and uniformly adhered to that in the same cause this court will not reverse nor revise its former decisions. (Citing cases) This general rule is grounded on public policy, experience, and reason. If all questions that have been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end of their litigation until the financial ability of the parties and the ingenuity of their coun-

> sel had been exhausted. A rule that has been so long established and acted upon and that is so important to the practical administration of justice in the courts should be followed and not departed from."

The decision in the *Miller* case was appealed to this Court, where it was affirmed *per curiam* in *Miller Lumber Company, et al. v. W.E. Floyd, et al.,* (1927), 273 U.S. 672, 47 S.Ct. 475, 71 L.Ed. 833.

Even more significant to the situation now before this Court is the decision of the Arkansas Supreme Court in *Bedell v. State of Arkansas,* 260 Ark. 401, 541 S.W.2d 297 (1976), in which, on a second appeal, the Arkansas Supreme Court said:

> "Our ruling upon the first appeal, that the prohibition against unreasonable searches and seizures does not extend to open fields and forested areas, has become the law of the case and will not be re-examined. The doctrine known as the law of the case applies to issues of constitutional law. *Feldman v. State Board of Law Examiners,* 256 Ark. 384, 507 S.W.2d 508 (1974); *Miller Lumber Co. v. Floyd,* 169 Ark. 473, 275 S.W. 741 (1925), affirmed, 273 U.S. 672, 47 S.Ct. 475, 71 L.Ed. 833 (1927). Hence it is immaterial that a federal court, after our decision upon the first appeal in this case, decided the point the other way. *United States ex rel. Gedko v. Heer,* 406 F.Supp. 609 (W.D. Wis. 1975). If the appellant thought our first decision to be wrong, he had the opportunity to seek a review by the United States Supreme Court."

As we have pointed out previously, the same issues were before the Arkansas Supreme Court in the first appeal as were presented in the second appeal, yet after the first decision, followed by a petition for rehearing, which was denied, the Petitioner elected to ignore the opportunity

to ask this Court for a Writ of Certiorari. Having passed that opportunity, we submit that the Petitioner is not entitled to a second bite at the apple.

We now touch briefly on the judicial precedents offered in support of the Petition. The assertion in Petitioner's brief that the case of *State, ex rel. Attorney General v. Wright,* 194 Ark. 652, 109 S.W.2d 123 (1937), should control the result in this case is patently erroneous. In the *Wright* case, the maker of a will died in Hot Springs, Garland County, Arkansas. His will was probated in Grayson County, Texas, where the majority of his assets were located. Subsequently, the State of Arkansas filed a Petition for administration in the Probate Court for Garland County, Arkansas, alleging that the will admitted to probate in Texas was a forgery, and should be ignored.

On appeal, the Arkansas Supreme Court held that a substantial portion of a decedent's assets was located in Texas at the time of his death, the Court of the county in which his principal property was located had jurisdiction to admit the will to probate, and that the order granting probate was not subject to collateral attack in Arkansas because the Texas order was entitled to full faith and credit.

The obvious distinction between the *Wright* case and the case under review by this Court is that in this case the Order of the Texas court admitting the Texas Will to probate was in fact given full faith and credit, and was admitted to probate in Arkansas. In addition, the question presented to the probate court in Arkansas was one of "domicile," not the validity of the Texas Will, and the opinion in the *Wright* case specifically recognizes that

the question of "domicile" can be decided by a second state without violating the full faith and credit clause of the United States Constitution.

Durfee v. Duke, 375 U.S. 106, 95 L.Ed. 552, 71 S.Ct. 474 (1951), is cited for the proposition that *res judicata* may present a federal question under the full faith and credit clause. In the *Durfee* case, this Court held that a judgment of the court of one state is entitled to full faith and credit, even as to questions of jurisdiction, when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. There is nothing in the record of the Morrison case to indicate that the issue of domicile was fully and fairly litigated in the Probate Court of Tarrant County, Texas.

Johnson v. Muelberger, 340 U.S. 584, 96 L.Ed. 552, 71 S.Ct. 474 (1951), certainly affirms that this Court is the final arbiter of questions raised under the full faith and credit clause, but it does not reject the general rule that such issues must be raised in the trial court if they are to be reviewed on appeal.

Frankly, it appears to us that the Petitioner has engaged in a process of attempting to garner for himself at least all of the assets that were not located in Arkansas at the time of the death of the decedent, although initially he was claiming everything she owned, relying on a Will he had her make just a few days after he moved her from a nursing home in Norman, Oklahoma, to another nursing home in Forth Worth, Texas, his place of residence. Having failed after two attempts in the Sebastian County Probate Court, and three requests to the Arkansas Supreme

Court, it now appears that if he can't get the assets himself, he will at least diminish what the two young granddaughters will finally get by generating legal expenses, and in any event, he will delay ultimate delivery to them.

CONCLUSION

We respectfully request that the Petition for Writ of Certiorari be denied. In addition, we submit that this Petition for Writ of Certiorari is so patently frivolous that this Court should award the Respondent appropriate damages pursuant to Rule 49.2.

Respectfully submitted,

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APPENDIX A

IN THE PROBATE COURT OF SEBASTIAN COUNTY, ARKANSAS

FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE OF

ALREN IRIS MORRISON, Deceased No. P 84-27

O R D E R

ON the 26th day of July, 1984, this matter came on for hearing. The Petitioner, John Garmon, and his wards, Kristen Lee Garmon and Katherine Lynn Garmon, appeared in person and by their attorney, Edgar E. Bethell. The Respondent, Harold Lee Morris, and his brother, Donold Morris, appeared in person and by their attorney, Richard L. Martin. After reviewing the pleadings, hearing the testimony of witnesses for both sides, and considering all of the exhibits, the Court makes the following findings of fact and conclusions of law:

1. Alren Iris Morrison, deceased, was for many years a resident of Fort Smith, Arkansas, and she, and her husband, Lem Morrison, deceased, occupied their own home located at 1532 South 40th Street in Fort Smith, Arkansas. Lem Morrison passed away in 1978, leaving his widow alone in the home. They had no relatives in Fort Smith. Their daughter, Andrea Garmon, now deceased, lived in Norman, Oklahoma. In 1979, Alren Iris Morrison fell in her home and broke her hip. When she was ready to leave the hospital, there was no one to care for her in her home, so her daughter, Andrea Garmon, took her to Norman, Oklahoma, where Andrea lived, and placed her in a nursing home.

2. Andrea Garmon died rather suddenly in September of 1979. On October 2, 1979, Alren Iris Morrison's brother, Harold Morris, came to Norman, Oklahoma, and moved her to Fort Worth, Texas, where he lived, and put her in a nursing home. While in the Fort Worth, Texas, nursing home, she fell again and broke either a leg or a hip, which materially set back any recovery, to the extent that she might otherwise have returned to her home in Fort Smith, Arkansas. She was visited in the Fort Worth, Texas, nursing home two or three times a year by her son-in-law, John Garmon, and her two grandchildren, Kristen Lee and Katherine Lynn Garmon, daughters of deceased Andrea Garmon.

3. Shortly after she was taken to Fort Worth, Texas, she executed a Last Will and Testament on November 23, 1979, by the terms of which her entire estate was left to her brother, Harold Morris. The grandchildren were not mentioned in the Will, by name or classification. After her death, the Will of Alren Iris Morrison was filed for probate in Tarrant County, Texas, was admitted, and Harold Morris was appointed Independent Executor.

4. On January 26, 1984, Petitioner filed herein a Petition for Appointment of an Administrator of the estate of Alren Iris Morrison, deceased, alleging that the deceased was domiciled in Fort Smith, Arkansas, at the time the Will was made, and at the time of her death. A Response to the Petitioner's request was filed on behalf of Harold Lee Morris, asserting that the deceased was domiciled in Texas, and that her Will should be construed, and her estate should be administered, pursuant to the laws of Texas.

5. After Alren Iris Morrison was moved to Norman, Oklahoma, and thereafter while being cared for in the Fort Worth, Texas, nursing home, she caused her home in Fort Smith, Arkansas, to be maintained in a ready-to-return condition. None of the furniture was ever removed, some of the utilities were kept on, her car was parked in the driveway under a carport, the yard was regularly maintained, she maintained her membership in the First United Methodist Church of Fort Smith, Arkansas, and on numerous occasions expressed to her grandchildren and others her wish, hope, and desire to return to her home in Fort Smith, Arkansas, and to be with her friends, and engage in her normal activities. The Court finds that her domicile was in Fort Smith, Arkansas, at the time she made the Will in Fort Worth, Texas, and at the time of her death, and that the Will should be construed, and the estate should be administered, pursuant to the laws of the State of Arkansas.

6. The Court finds that the decedent left no children surviving her, but that she did leave two grandchildren, the children of her deceased daughter, Andrea Garmon. These grandchildren, Kristen Lee Garmon and Katherine Lynn Garmon, are not mentioned or named, individually or by classification, in the Will executed November 23, 1979; that they are under the laws of the State of Arkansas pretermitted children; and that they are entitled to the share of the estate of Alren Iris Morrison, deceased, which would pass to them under the Arkansas law of descent and distribution.

7. The passage of title to the real estate located in the State of Arkansas is also governed by the laws of the State of Arkansas.

Being well and sufficiently advised in the premises, it is

ORDERED that the Will of Alren Iris Morrison which was admitted to probate in Tarrant County, Texas, should be and the same is hereby admitted to ancillary probate in the Fort Smith District of Sebastian County, Arkansas; it is further

ORDERED that Merchants National Bank of Fort Smith, Arkansas, be and it is hereby appointed Ancillary Administrator of the estate of Alren Iris Morrison, deceased, and being a bank whose deposits are insured by the Federal Deposit Insurance Corporation, no bond will be required, and the Clerk of this Court shall forthwith issue Letters of Administration to Merchants National Bank upon the filing of an Acceptance of Appointment by said Bank; it is further

ORDERED that Harold Lee Morris of Fort Worth, Texas, shall forthwith, upon demand by the Administrator, file in this proceeding a detailed inventory of the money and property of Alren Iris Morrison which has come into his possession, together with a detailed statement of any expenditures or other disposition of the property of the deceased which has been made by him; it is further

ORDERED that upon demand by Merchants National Bank, Harold Morris shall immediately deliver to Merchants National Bank of Fort Smith, Arkansas, all of the money and property of Alren Iris Morrison which has come into his possession; it is further

ORDERED that administration of this estate, and the distribution of the assets of the same, shall be in accordance with the laws of the State of Arkansas.

Entered this 2nd day of August, 1984.

/s/ Bernice L. Kizer
PROBATE JUDGE

APPENDIX B

IN THE PROBATE COURT OF SEBASTIAN COUNTY, ARKANSAS

FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE OF

ALREN I. MORRISON, Deceased No. P 84-27

O R D E R

ON this 13th day of February, 1986, comes on for consideration the Petition of Harold Lee Morris requesting this Court to order Merchants National Bank of Fort Smith, Arkansas, Administrator of this estate, to transfer to the possession of the Petitioner 462 shares of the common stock of Foremost-McKesson, Inc., and 616 shares of the preferred stock of said corporation, and $2,944.93 cash. Response to this Petition was filed on behalf of the Ancillary Administrator, Merchants National Bank.

Based on the record in this case, the Court finds that it has been established by the decision of the Arkansas Supreme Court in the case of *Harold Lee Morris vs. John Garmon*, 285 Ark. 259, 686 S.W.2d 396 (1985) that the decedent, Alren Iris Morrison, was domiciled in the State of Arkansas at the time of her death; that the grandchildren of the decedent were pretermitted heirs of the decedent, and that under the laws of the State of Arkansas, they are entitled to inherit all of the assets of the estate of the decedent; that the assertion that the full faith and credit clause of the United States Constitution binds this Court to comply with orders of a Probate Court of Tarrant County, Texas, was presented to and denied by the Ar-

kansas Supreme Court in the case mentioned above; that the assertion that this Court is bound by the principle of *res judicata* to comply with an Order of the District Court of Cleveland County, Oklahoma, was also disposed of by the opinion of the Arkansas Supreme Court mentioned above.

This Court further finds that the Petitioner, as Texas Executor of the Estate of Alren I. Morrison, has not filed a Bond in Arkansas or Texas; that under the laws of the State of Texas, he is an Independent Executor whose handling of the estate's assets is subject to very little supervision by the Texas Probate Court. On the contrary, Merchants National Bank, Ancillary Administrator, has insurance coverage on the assets of this estate through the Federal Deposit Insurance Corporation which insures proper handling of this estate in an amount in excess of the value of the assets in its hands.

This Court further finds that no meritorious reason has been offered by Petitioner to support his request that some of the assets in the hands of the Ancillary Administrator should be turned over to him. All of the assets are to be distributed to the two grandchildren. There are no claims against the estate, other than the final costs of administration. The estate is ready for final distribution and closing. There is no reason to incur further delay and additional costs which will reduce the amounts which would be received by the heirs, by placing some of the assets in the hands of the Texas Executor. Being well advised in the premises, it is

ORDERED that the Petition of Harold Lee Morris to require Merchants National Bank to deliver to him some

of the assets of this estate be, and the same hereby is, denied; and it is further

ORDERED that the Ancillary Administrator proceed with dispatch to take such actions as may be necessary to make final distribution of the assets of this estate, and to close this administration.

Entered this 13th day of February, 1986.

/s/ Bernice L. Kizer
Honorable Bernice L. Kizer
Probate Judge